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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1930.

No. 5

INDIAN MOTORCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

On Certificate from the Court of Claims.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Comes now the undersigned and respectfully moves for leave to file the annexed brief for the Excelsior Motor Mfg. & Supply Company, as a friend of the Court. Counsel for both parties have consented to the filing of this brief.

The undersigned is counsel for the Excelsior Motor Manufacturing & Supply Company which manufactures the Excelsior Motorcycle, in its suit against the United States now pending in the Court of Claims (No. K 10, therein) which presents the same question presented in this case and in order that the Excelsior Company may be heard in the determination of its rights in said suit, it is desired to file this brief.

JOHN E. HUGHES.

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INDIAN MOTORCYCLE COMPANY

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On Certificate from the Court of Claims.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE EXCELSIOR MOTOR MANUFACTURING & SUPPLY COMPANY.

PRELIMINARY STATEMENT.

May It Please the Court:

A decision of this case will be determinative of the same question presented to the Court of Claims in the case of the Excelsior Motor Manufacturing & Supply Company, in which the undersigned is counsel and the Court's permission to file this brief is greatly appreciated.

In the brief of the plaintiff there has appeared a statement on the grounds upon which the jurisdiction of this Court is invoked, the question certified, the statute involved and the facts of the case which need not be repeated here.

QUESTION PRESENTED.

The question presented in the case at bar is whether the Federal Government has power to impose an excise tax on sales to states and subdivisions of states.

SUMMARY OF ARGUMENT.

In this brief it will be argued that the Federal Government has not the power to impose a tax on sales to states or subdivisions thereof because "the power to tax involves the power to destroy", and if this power exists there are no limits to it and the Federal Government has the power to destroy the states.

It will be argued that the principle is firmly established that the states cannot tax the instrumentalities of the Federal Government and that the Federal Government cannot tax the instrumentalities of the states; that the rights of the state and the Federal Government to have their instrumentalities free from taxation by the other are equal and that the fact that the tax is, for convenience in collection, imposed upon and collected from the vendor is immaterial; that all sales tax must for convenience in collection be imposed upon and collected from the vendor but they are in reality paid by the consumer.

ARGUMENT.

This case in itself involving only $13.83 presents a great question of state rights.

However, the principles applicable to its solution have long been regarded as firmly established and their application to the question certified here compels a negative answer.

An affirmative answer to that question will be a departure from long established principles and place it in the power of the Federal Government to destroy the states.

As said by Chief Justice Marshall in *McCulloch v. the State of Maryland, et al., 4 Wheaton 316:*

"The power to tax involves the power to destroy". It is not a question of degree but of principle. If the existence of the power be conceded there are no limits to its exercise. "If the right to impose the tax exists it is a right which in its nature acknowledges no limts."

(Chief Justice Marshall in *Weston et al. v. the City Council of Charleston, 2 Pet. 449):* "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively". *(United States v. Baltimore & Ohio Railroad Company, 17 Wall. 322.)*

If the Federal Government has the power to compel a state to pay a tax of 5% of the cost of a motorcycle, it has the power to exact a tax of 500% of this cost. If it can tax a manufacturer 5% on sales to a state, it can lay a tax so prohibitive that the manufacturer cannot

afford to sell to the state unless the state pays the tax. The tax can be made so great that the state cannot function and the Federal Government can raise all its revenue by taxing sales to the states and their subdivisions.

It is well established that the Federal Government cannot tax the instrumentalities of the States nor can the States tax the instrumentalities of the Federal Government.

In *Collector v. Day, 11 Wall. 113,* it was held that Congress did not have the power under the Constitution of the United States to impose a tax upon the salary of a judicial officer of a state. At pages 126 and 127 the Court said:

> "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

Again it is said in that case:

> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution one